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"Thou shall not...(dis)trust"

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of Community Law within the Member States and elsewhere, and for the dissemination of legal thinking on Community Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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“THOU SHALL NOT...(DIS)TRUST”: CODES OF CONDUCT AND HARMONIZATION OF PROFESSIONAL STANDARDS IN THE EU

PANAGIOTIS DELIMATIS*

1. Introduction

In 2002, the Commission in its report on “The State of the Internal Market for Services”,¹ which formed part of the internal market strategy for services adopted by the Commission in December 2000,² was adamant about the never-ending tale of completing the internal market for services. Complex regulatory barriers have been substituted for physical and technical barriers, thereby diminishing the possibilities for a genuine, integrated internal market for services. And yet services account for two-thirds of total employment and for all new employment growth within the Union,³ while other studies praise the growth-generating effects and positive spillovers of services liberalization.⁴

The EU as a block is the leading player in international trade in services with a surplus of €68.5 billion in 2006, representing a world share in trade in services of around 25 per cent.⁵ In business services, which incorporate

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1. European Commission, “The State of the Internal Market for Services”, COM(2002)441 final, 30 July 2002.

2. European Commission, “Internal Market Strategy – Priorities 2003–2006”, COM(2003)238, 7 May 2003. This strategy came as a response to the request by the Lisbon European Council in March 2000. See the Presidency Conclusions of the Lisbon European Council, para 17.

3. European Commission, “New European Labour Markets, Open to All, with Access for All”, COM(2001)116 final, 28 Feb. 2001.

4. *Inter alia*, Mattoo, Rathindran and Subramanian, “Measuring services trade liberalization and its impact on economic growth: An illustration”, 21 *Journal of Economic Integration* (2006), 64–98.

5. Eurostat, *Europe in Figures – Eurostat Yearbook 2008* (Luxemburg, 2008), p. 358. It bears mention that these data do not include sales of foreign affiliates, the so-called mode 3 under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO).

professional services, the EU achieved a surplus of €31 billion in 2006, one of the highest scores that year. Outsourcing is one of the main reasons explaining the sector's rapid growth. Intra-EU trade in services, on the other hand, amounts to 57 per cent of total exports of services and accounts for one-quarter of the global trade in services.⁶

The fragmentation that characterizes the regulation of services supply within the European Union negatively affects the competitiveness of European firms and undermines the ambitious objective of the Union becoming the most competitive and dynamic knowledge-based economy worldwide ("Lisbon Strategy"). This is so because services play an essential role in the overall functioning of markets, since they underlie the relations between producers and consumers. Services are a crucial component of the information industry networks on which these relations between producers and consumers depend. Instantaneous interactive communication permits transactions in an increasing number of services to occur at the same time but in different places. This allows the previously indispensable requirement of proximity between consumer and service supplier to be overcome, and thus increases the tradability of services. Furthermore, the growing interpenetration of services and goods in the supply and demand cycles means that any policy seeking the optimal allocation of productive resources must now take into consideration regulatory issues in both goods and services.⁷

The adoption of the Services Directive (hereinafter, "the Directive") was the long-awaited EU reaction to this situation with a view to achieving more effective regulation of services supply within the Union.⁸ Earlier, the European Commission's Proposal for a Services Directive (hereinafter "the Proposal")⁹ recognized the importance of trust in the achievement and the smooth functioning of a genuine internal market for services. The lack of trust reveals the absence of a "thinking European" mentality¹⁰ and is translated into protectionist interests that foreclose foreign competition; negate the possibility of comparison; and thus obliterate any motivation for domestic service suppliers

6. Eurostat, "Statistics in Focus", 57/2008.

7. Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (OUP, 2007), pp. 62–63. For this intermingling, compare Case C-390/99, *Canal Satélite Digital*, [2002] ECR I-607, paras. 31–33. In the WTO context, see the recent Appellate Body Report, *China – Audiovisual Products*.

8. Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on Services in the Internal Market O.J. 2006, L 376/36. The Directive was to be implemented by Dec. 2009 at the latest. For a detailed account of the Directive, see Barnard, "Unravelling the Services Directive", 45 CML Rev. (2008), 323–394.

9. European Commission, "Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market", COM(2004)2, 13 Jan. 2004.

10. European Commission report, cited *supra* note 1, 45.

to improve their services.¹¹ This lack of trust evidently affects consumer welfare within the EU: static analyses have found that the removal of the country of origin principle from the Directive in its final form deprives the EU of an additional €2-4 billion p.a. or 10 per cent of the expected welfare gains following the adoption of the Directive.¹²

In the absence of the country of origin principle, the creation of codes of conduct (CoC) at a European level as an alternative, soft method of progressive rule-making acquires new dynamics. The Directive regards the creation of pan-European CoC (dealing notably with issues such as commercial communications or rules of professional *ethos*) as a useful instrument¹³ that can be used to reinforce trust in the quality of qualification or licensing requirements and procedures of the other Member States.¹⁴ While they are soft-law instruments, CoC partake in the effort to guarantee a high level of quality and safety commensurate with the ever-increasing expectations of the EU citizens. The objective remains to enhance trust among Member States regarding the equivalence of services and service suppliers originating in other Member States.

This paper explores the impact of CoC on the liberalization of professional services using as a starting point the Directive and the continuing attempt to harmonize professional standards at EU level. Effective market access for service suppliers can depend heavily on such codes, which are typically adopted by non-State, self-regulated bodies, e.g. professional associations, sports federations etc. While such (mostly voluntary) rules of conduct are aimed to improve the quality of the services supplied by the professionals subject to such rules, they can nevertheless unduly hinder the intra-EU movement of professionals. Liberalization of factor mobility enshrined in primary and secondary EU law or agreed on during State-to-State negotiations at a multilateral

11. For the positive effects of mutual trust more generally, see the seminal work by Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Free Press, 1995).

12. See Copenhagen Economics, "The Economic Importance of the Country of Origin Principle in the Proposed Services Directive", 2005, 9 at <www.copenhageneconomics.com/Admin/Public/Download.aspx?file=/Files/Filer/Publikationer/trade4.pdf> (last visited 30 Aug. 2009). In other studies, the negative effects of the non-incorporation of the country of origin principle appear to be even greater. See de Bruyn, Kox and Lejour, "The trade-induced effects of the Services Directive and the country of origin principle" (CPB document No. 108, Feb. 2006), 42 at: <www.cpb.nl/nl/pub/cpbreeksen/document/108> (last visited 30 Aug. 2009).

13. The other instruments are: (minimum or targeted) harmonization; administrative co-operation and mutual assistance between national authorities; and (voluntary) measures promoting the quality of services. See also the 7th recital of the Directive.

14. European Commission report, cited *supra* note 1, 4. Mutual trust can of course be enhanced through co-operation between Member States' authorities or the use of electronic information systems such as the newly established Internal Market Information System (IMI). See European Commission Recommendation on measures to improve the functioning of the single market, O.J. 2009, L 176/17, Recital 9.

level can be jeopardized by the adoption and application of such codes. Thus, CoC exemplify the collapse of the traditional public *versus* private divide; underscore the non-dichotomic reality that soft law developments imply; and ultimately raise thorny questions.

Part 2 critically analyses the meaning and the rationale of the mandate incorporated in the Directive calling for the creation of pan-European CoC and examines the possible content of such CoC. Part 3 places the mandate and the private sector involvement sought by the Directive within the broader context of the new legislative culture that the EU has adopted and which endorses alternative methods of regulation and soft law. The CoC-specific issues that can have an impact on the free movement rules are examined in Part 4, whereas Part 5 deals with the competition law issues that the application of CoC may raise and reviews the scope of the EU competition law rules as clarified by the voluminous ECJ case law. Part 6 concludes.

2. The mandate for the creation of pan-European Codes of Conduct

2.1. Setting the scene: The Directive

Services are more vulnerable to regulations impeding their supply. This chilling effect is due to the peculiar nature of services: services are typically non-tangible, non-storable, and above all heterogeneous, with limited possibilities of mass production. Thus, many of the most “effective” barriers to free movement of services relate to the pre- or post-establishment of juridical and natural persons.¹⁵ In addition, quality, the “holy grail” of every law or regulation governing services, is closely intertwined with the characteristics, qualifications, experience and so forth of each individual service provider. This trait of services regulation increases the transaction costs and undermines the pursuit of efficiency when regulating this highly heterogeneous sector of the economy.

From an economic viewpoint, another important eccentricity of the nature of protection in services industries is that most of the barriers to trade in services have characteristics akin to quantitative restrictions. This means that such barriers generate artificial scarcity, which in turn leads to inflated prices and hence the creation of economic rents. The creation of these economic rents induces incumbents to lobby to retain protection.

The Proposal’s solution to this challenge was the country of origin principle, which would essentially create a presumption of equivalence among intra-EU

15. Cf. Delimatsis, “Due process and ‘good’ regulation embedded in the GATS – Disciplining regulatory behaviour in services through Article VI of the GATS”, 10 *Journal of International Economic Law* (2007), 16.

service suppliers. The abolition of this principle from the final text of the Directive cynically demonstrates the absence of mutual trust in the current stage of European integration and how long and winding the road may be until mutual trust among the Member States is actually established. Services and service suppliers from other Member States are viewed with suspicion and considered as menacing the allegedly “exceptional” quality and safety of services produced domestically.¹⁶

The Directive ambitiously aims to eliminate remaining regulatory barriers to the achievement of the internal market in services, while ensuring legal certainty for service suppliers and consumers and setting the foundations for gradual trust-building.¹⁷ It adopts a horizontal approach based on the understanding that, while ubiquitous and diverse, several services sectors call for regulatory intervention to pursue a certain set of legitimate policy objectives which appear to be common to more than one sector, such as consumer protection, the integrity of the profession, or ensuring the quality of the service.

The objective of the Directive is to enable both service suppliers and consumers to benefit from the fundamental freedoms guaranteed in Articles 49 and 56 TFEU, that is, the freedom of establishment and the freedom to provide services.¹⁸ In this respect, the Directive consolidates previous European Court

16. This suspicion typically takes the form of systematic application of the host-country rules; the simple evocation of “general good” objectives to justify obstacles, without verifying the equivalence of the protection in the country of origin or the proportionality of the restriction; the subjection of EU operators to the same system as that applied to third-country undertakings; the presumption of circumvention of national rules by any cross-border service; or a particular zeal in regularly checking suppliers from other Member States. See European Commission report, cited *supra* note 1, 53–54. A case in point is gambling services. The ECJ adopted a reluctant stance notably when it comes to games of chance offered via the internet. The ECJ rejected the relevance of the principle of mutual recognition in this type of situation on the basis that the mere fact that a supplier lawfully provides services of this type in another MS “cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the [host MS] in assessing the professional qualities and integrity of operators”. See Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, judgment of 8 Sept. 2009, nyr, para 69; and C-203/08, *Sporting Exchange*, judgment of 3 June 2010, nyr, para 33.

17. Note, however, that some of the most sensitive services sectors are outside the scope of the Directive. See Art. 2:2 of the Directive.

18. The Directive provides that suppliers already established in another Member State cannot be prevented from providing their services in a given Member State on the basis that they do not have an establishment in that Member State (Art. 16(2)(a)). For the sake of comparison, Art. 56 on the freedom to provide services is the equivalent of Mode 1, Mode 2 and Mode 4 under the GATS, since it covers the supply of services on a *cross-border* basis, the movement of the *consumer* to the location of the supplier to *receive* the service and the *temporary* movement of the supplier in order for him to be able to supply the service in question in the host country.

of Justice case law on related issues.¹⁹ While numerous sectors are excluded from the scope of the Directive, the latter does apply to business services and covers *inter alia*, most of the regulated professions within the EU. Importantly, *ratione materiae*, the Directive adopts a sweeping definition of the term “requirements”, so as to cover

“any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy”.²⁰

This definition thereby confirms the view that private action by professional associations when they self-regulate their activities is equally subject to the obligations laid down in the Directive.

According to estimations, this new framework, when transposed to national laws, is expected to have tangible beneficial effects for EU growth and employment rates.²¹ It follows that, even in the absence of the country of origin principle, the effect of the Directive should not be underestimated. It should rather be deemed a major step towards further developing mutual trust with a view to expanding trade in services within the EU. Fighting the ignorance relating to the scope of EU law at the national level and the lack of transparency regarding national measures affecting the delivery of services, as well as leveling the playing field with regard to the protection of public interest to a certain extent, is an appropriate way forward to further enhance trust among Member States. Mutual confidence cannot come out of the blue and “invisible hands” are simply a chimera when it comes to the cognitive part of trust, as exemplified by the unfortunate narrative of the “Polish plumber”. Arguably, this mistrust among the Member State authorities, sometimes accompanied by phobic domestic political discourse or media campaigns launched by domestic constituents and special interest groups is translated into a lack of confidence from the side of citizens towards foreign services.

2.2. *The legal mandate relating to CoC enshrined in the Directive*

The Directive incorporates a convergence programme aiming to, *inter alia*, target harmonization in specific areas, such as the access to the activity of

19. See, *inter alia*, Case C-55/94, *Gebhard*, [1995] ECR I-4165, paras. 22–27.

20. Art. 4(7) of the Directive. See also European Commission (DG Internal Market and Services), “Handbook on Implementation of the Services Directive”, 2007, 16.

21. WTO, “Trade Policy Review – European Communities”, WT/TPR/S/177, 22 Jan. 2007, 109.

judicial recovery of debts or private security services and transport of cash and valuables. An important part of this chapter forms the mandate directed to the Member States and the Commission to encourage the establishment of pan-European CoC. Article 37 of the Directive reads: “Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up at Community [sic] level, particularly by professional bodies, organizations and associations, of codes of conduct aimed at facilitating the provision of services or the establishment of a provider in another Member State, in conformity with Community [sic] law.”

In the absence of a top-down approach that the country of origin principle would substantiate, the Directive puts the accent on the merits of a bottom-up approach, where the private sector is called upon to fulfil a decisive role and serve the objective of furthering European integration. The call for the creation of CoC is clearly an element in moving in this direction. While technically forming part of Chapter VII of the Directive, the mandate incorporated in Article 37 regarding the creation of pan-European CoC is deemed an essential component of the Directive’s most important objectives, as depicted notably in Chapter V of the Directive, to improve the quality of the services supplied within the Union and to enhance transparency as to the conditions regulating the access to and the exercise of a given profession in the various Member States.²² Supplying services of high quality is rightly considered as an essential prerequisite for the improvement of European competitiveness and the establishment of the Union as the best exporter of services worldwide.

CoC appear to be particularly relevant for the so-called “regulated professions” within the EU legal order where compulsory registration with the corresponding professional associations also exists.²³ A regulated profession is

“a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit”.²⁴

Regulated professions have two important traits: first, registration with the professional association is compulsory. Second, these professions are self-regulated for the most part. Compulsory registration allows for sanctions

22. See European Commission Handbook, cited *supra* note 20, 62.

23. The use of CoC seems also to be appealing to other areas of services such as information society services.

24. Art. 3(1)(a) of the Directive 2005/36/EC of the European Parliament and of the Council of 7 Sept. 2005 on the recognition of professional qualifications, O.J. 2005, L 255/22.

against those professionals who do not abide by the rules established by the professional body, including deontological rules usually contained in the sectoral CoC. However, not all professions oblige the individuals concerned to register with the professional association. The mandate of Article 37 is equally – if not more – important for non-regulated professions, as the uniformity of rules of ethics that apply to them across the Union can be even looser. A common set of rules for these professions will enhance quality and gain the trust of consumers, while allowing for the identification of those who may be “cheating”.

2.3. *Why create pan-European Codes of Conduct?*

Because of the manifest abundance of non-governmental collective rules in this area, including CoC, Member States and the Commission recognize the beneficial effects of drawing up common sets of rules pertaining to issues such as independence, impartiality or professional secrecy, which would apply to a given profession exercised across the Union. As professional associations become the final “masters” of the pursuit of the corresponding profession at national level, setting both pre- and post-access-related rules, typically through a government act that delegates its regulatory powers to the associations, one can realize the positive effects that some alignment of the ethical or other rules regulating the profession may have for the integration of the EU services market. In addition, the risk of abuse may be particularly high in cases where domestic suppliers, in their function as members of the domestic professional association, may be called upon to decide on the aptitude of a service supplier originating in another Member State and intending to establish herself in that market or applying for an authorization to deliver her services cross-border.²⁵

This mandate highlights the fact that existing rules of conduct at a national level, while not discriminating on the basis of origin of the service supplier, can potentially constitute unnecessary barriers to the freedom to provide services and the freedom of establishment. This is so because they bring about regulatory asymmetries and market fragmentation, or otherwise impede the mobility of service suppliers or their ability to supply their services in a cross-border manner. As professionals increasingly supply their services across borders, the need for common sets of minimum rules of conduct which would determine the contours of the supply of a given service throughout the Union is becoming pressing if a genuine internal market for services is to be achieved.

25. See e.g. Case C-506/04, *Wilson*, [2006] ECR I-8613, paras. 50–58. Of course, States may intervene to provide for certain guarantees ensuring objectivity and impartiality of such decisions. Cf. Case C-250/03, *Mauri*, [2005] ECR I-1267, paras. 44–45, 32–35.

Ultimately, such sets of rules will ensure uniformity regarding the minimum level of consumer protection and the high quality of the services supplied at EU level.²⁶

Adequately pursuing public policy objectives at EU level is essential in the quest to further enhance trust between Member States. Indeed, the current status quo with diverse CoC agreed on exclusively at a national level hints at a national perception of the quality of services. In addition, the fact that some professional associations in a given Member State are not subject to a domestic CoC may create prejudice in other Member States with regard to the quality of the services supplied by the members of these professional associations, and ultimately lead to a certain distrust (in particular, when the services are supplied cross-border) and to market fragmentation.²⁷ Therefore, the function of the CoC is twofold: they facilitate mobility of service suppliers (mobility-enabling function), but at the same time they aim to enhance trust in services and service suppliers originating in other Member States (confidence-building function). Importantly, CoC will lead to the identification of a minimum, acceptable level of quality when a given service is supplied and, more importantly, to the emergence of a European concept of “quality of service” in given services sectors, which would be an identifiable trait of these sectors throughout and beyond the Union.

Furthermore, the creation of pan-European CoC would simplify the current conundrum with several national CoC applying to situations which go beyond national borders. For instance, take the case of the Lawyers Establishment Directive,²⁸ which establishes a mechanism for the mutual recognition of professional titles of migrant lawyers desiring to practise under their home-country professional title. This Directive provides that a European lawyer must comply not only with the rules of professional conduct applicable in her home Member State but also with those of the host Member State, failing which she will incur disciplinary sanctions and exposure to professional liability.²⁹ Nevertheless, *quid* when these rules are conflicting? Or with services where it cannot be determined in which Member State they are actually supplied?³⁰

26. European Commission Handbook, cited *supra* note 20, 68.

27. See European Commission (DG Internal Market and Services), “Enhancing the Quality of Services in the Internal Market: The Role of European Codes of Conduct”, 2007, 6.

28. Directive 98/5 of the European Parliament and the Council of 16 Feb. 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. 1998, L 77/36.

29. *Ibid.*, Arts. 6 and 7.

30. For the sake of comparison, similar questions have been raised as to the distinction between Mode 1 (cross-border supply) and Mode 2 (consumption abroad) under the GATS. See e.g. WTO, Trade in Services: “Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services”, S/L/92, 28 March 2001, 22.

Situations of this type call for coherent solutions. Finally, the nature of other rules such as limitations on the types of services that can be supplied or on the legal form under which such services are allowed to be supplied may have a dissuasive effect on professionals of other Member States otherwise capable of exercising the fundamental freedoms enshrined in Articles 49 and 56 TFEU.

2.4. *What content for the pan-European Codes of Conduct?*

The Directive does not contain any specific guidance with respect to the form of such CoC nor to their content. For instance, it does not attempt to hint at what “ensuring the quality” entails or what should be the level of protection pursued.³¹ Rather, it bluntly spells out the *telos* of the mandate, that is, the facilitation of free movement pursuant to the Treaties.³² Nevertheless, absent any further specifications under Article 37, the recitals preceding the main body of the Directive are highly informative. Thus, they first make clear that pan-European CoC should aim to ensure the quality of the service supplied and at the same time take into consideration the specificities of the profession at issue. In Article 26(3), the link is made between quality assurance, consumer protection and co-operation between professional bodies and consumer associations at EU level. This provision requires that Member States, together with the Commission, enact appropriate measures to instigate co-operation of private associations at the EU level to promote the quality of services, notably by facilitating the proper assessment of the competence of a given provider. Reducing the existing information asymmetries would lead to enhanced consumer protection and enable informed choices by consumers. Furthermore, the compatibility of CoC with legally binding rules relating to professional ethics and conduct at a national level and competition law at EU level should be ensured.³³

31. The Court appears to be ready to consider as acceptable at EU level the level of protection proposed by the Commission, having regard to the public interest pursued by the various Member States. See Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, paras. 16 and 17; also Case C-168/98, *Luxembourg v. Parliament and Council*, [2000] ECR I-9131, paras. 43–44.

32. In this sense, CoC have a *post-law* function, in that they supplement and support the practical application of secondary law, *in casu*, the Directive. At the same time, it can be argued that they are intended as an alternative to EU legislation and therefore they can also be deemed to have a *para-law* function. See Senden, *Soft Law in European Community Law* (Hart, 2004), pp. 214–215.

33. See recital 113 of the Directive on the applicability of the EU competition rules to CoC, see Section 5 *infra*.

In more general terms, CoC typically codify traditional virtues that have demarcated a given profession for decades or even centuries³⁴ and spell out binding obligations adopted by governments, usually going beyond what law prescribes.³⁵ They comprise rules relating to independence, impartiality, loyalty, professional competence and integrity, trustworthiness, confidentiality, conflict of interest, charging of fees and professional secrecy. CoC typically include rules about desirable behaviour (value orientation) and rules about prohibited behaviour (compliance orientation).³⁶ Such rules are typically related to professional conduct, but they may also call for a certain lifestyle in private life.³⁷ Furthermore, depending on the specifics of the profession, they define the conflicting interests and ideally hierarchize them. For instance, Article 2.7 of the Council of Bars and Law Societies of Europe (CCBE) Code of Professional Conduct stipulates that the primary allegiance of a lawyer should be to her client, sacrificing her own interest and that of her colleagues.³⁸

In several professional services, such as legal, CoC may require that professionals be covered by professional liability insurance³⁹ for errors and omissions the level of which will depend on the nature and extent of the risk.⁴⁰ As compliance with this latter rule is typically reflected in the final price of the service delivered, agreement on common rules appears to be essential to avoid unfair price-based competition. For instance, competition can be distorted when domestic professionals are obliged to conclude such insurance, whereas cross-border suppliers or suppliers temporarily providing their services may not be bound by such a rule in their home State. The cross-border suppliers would

34. The Code of Professional Conduct, adopted by the Council of Bars and Law Societies of Europe (CCBE) in 1988 and most recently amended in 2006, underscores in its Art. 2(2) that trust and professional integrity are traditional virtues that constitute at the same time professional obligations. This Code is binding on any lawyer undertaking cross-border activities within Europe.

35. For the purpose of this study, the concept of CoC should be considered as also encompassing elements that, in practice, may be found in quality charters. The latter comprise exclusively rules describing the manner in which the service is to be provided.

36. See Nijhof, Cludts, Fisscher and Laan, "Measuring the implementation of Codes of Conduct – An assessment method based on a process approach of the responsible organisation", 45 *Journal of Business Ethics* (2003), 66.

37. E.g. Art. 2 of the International Code of Ethics adopted by the International Bar Association (IBA) in 1956 and amended in 1988 provides that: "Lawyers shall at all times maintain the honour and dignity of their profession. They shall, in practice as well as in private life, abstain from any behaviour which may tend to discredit the profession of which they are members."

38. *Supra* note 34.

39. Pursuant to Art. 23(5) of the Directive, professional liability insurance is a type of insurance taken out by a provider to cover potential liabilities to recipients and, where applicable, third parties arising out of the provision of the service.

40. The Directive hints at this possibility and the need for the conclusion of professional insurance cover. See recitals 98, 99 and Art. 23 of the Directive.

not have to internalize any insurance cost in the final cost of their service and thus can offer it at a lower price.

Finally, CoC often include provisions on disciplinary sanctions in case the rules are not abided by, although usually this deterrent is only used *in abstracto* and mentioned as a mere possibility.⁴¹ However, civil or even penal sanctions cannot be excluded in the case of serious infringement.⁴²

In addition to these basic, mostly fiduciary standards, of particular importance for our purposes are two areas where the Directive contains fairly detailed rules on the legality of restrictions: the first relates to commercial communications while the second refers to the establishment of multidisciplinary practices.

Rules governing commercial communications typically form part of CoC in several services sectors.⁴³ In the Commission's report on "the State of the Internal Market for Services", the distortive effect of restrictive and detailed rules for such communications – ranging from outright prohibitions on advertising to strict control of content – was highlighted. Such restrictions are particularly burdensome for professionals or legal persons who are not established in a given jurisdiction and thus their only option to become known in that market is through this type of promotional activities. Contrary to the case of goods, such rules impede the pursuance of a pan-European promotional campaign. The report identified the existence of such limitations in several sectors, such as business (where most of the regulated professions are classified), distribution, telecommunication, or financial services.⁴⁴

Article 24 of the Directive invites Member States (but also professional bodies and private associations regulating the pursuit of a given profession in a collective manner) to remove all outright bans on commercial communications by the regulated professions, such as bans of all advertising in one or more media of communication.⁴⁵ Manifestly, the Directive does not seek to question the utility of prohibitions on the *content*, but only those restrictions

41. See Art. 1(2)(1) of the CCBE Code of Professional Conduct, cited *supra* note 34.

42. See European Commission report cited *supra* note 27, 9.

43. Commercial communication includes any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organization or person engaged in commercial, industrial or craft activity or practising a regulated profession. See Art. 4(12) of the Directive. According to the Handbook, not only advertising but also other means of communication such as business cards mentioning the title and the specialty of the service supplier should be regarded as coming under this definition. See European Commission Handbook, cited *supra* note 20, 65. This, however, is too broad an interpretation. A business card, unlike a prospectus or a brochure, would merely give factual information relating to the titles of the supplier or his contact details such as professional address and phone number. Therefore, it is argued that business cards would probably fit into the exception of Art. 4(12)(a) of the Directive.

44. European Commission report, cited *supra* note 1, 27–29.

45. See also recital 100 of the Directive.

relating to the chosen *form* of commercial communication.⁴⁶ The link with codes of conduct is made in paragraph 2 of Article 24 which requires Member States to ensure that communications of this type are consistent with professional rules which are in conformity with EU law. These rules, usually enshrined in voluntary CoC, set rules, conditions and qualifications with respect to the independence, dignity and integrity of the profession or the appropriate conduct relating to professional secrecy. The Directive requires that such rules be non-discriminatory, justified by an overriding public interest requirement and compatible with the principle of proportionality. In addition, they have to be *specific* to the nature of the profession at issue. This specificity requirement calls for a case-by-case analysis of rules limiting commercial communications.⁴⁷ The Directive acknowledges the need for a bottom-up approach whereby the professionals themselves should agree on pan-European rules governing the suitability of the content and methods of commercial communications in their own profession, which will form an integral part of the pan-European CoC for this profession.⁴⁸

Another element that was identified in the Commission's report on the "State of the Internal Market for Services" and picked up in the Directive is the consistency with EU law of restrictions or limitations relating to multidisciplinary practices. Article 25 of the Directive seeks the removal of requirements limiting the exercise of different activities jointly or in partnership where such restrictions are not necessary to ensure the impartiality, independence and integrity of the regulated professions or to guarantee compliance with the rules governing professional ethics and conduct.⁴⁹ The Directive further specifies that several restrictions on such partnerships can be tolerated, such as certification, accreditation, technical monitoring and testing services, insofar as a close link with the objective of ensuring the independence and impartiality of the providers in question is established.⁵⁰ However, in the case where Member States decide to allow the creation of multidisciplinary partnerships, the Directive requires that Member States guarantee the prevention of conflicts of interest and the independence and impartiality of the providers. Importantly, the Directive alludes to the findings of the *Wouters* case by reiterating the importance of adopting rules of professional ethics and conduct, typically incorpo-

46. In practice, the distinction between the two may not be made so straightforwardly.

47. E.g. the ECJ found that such a ban on advertising in the dental surgery sector in Belgium was consistent with the EU competition rules. Case C-446/05, *Doulamis*, [2008] ECR I-1377.

48. *Ibid.*

49. See recital 101 of the Directive.

50. According to Arts. 25(3) and 39 of the Directive setting a framework for mutual evaluation of laws and regulations in the area of services, Member States shall evaluate existing restrictions and explain why they consider them to be justified, including why less restrictive means are not available in this respect. See European Commission Handbook, cited *supra* note 20, 66.

rated in professional CoC, which are compatible with the activities represented in these partnerships, especially when professional secrecy may be put in jeopardy.⁵¹ In addition, and again based on the Court's findings in *Wouters* and the Directive, a separate examination of the specific nature of the relevant professions is warranted to uphold or deny the legality of restrictions against multidisciplinary practices.⁵²

The Directive calls for the review and assessment of the relevant legislation, *inter alia*, relating to multidisciplinary activities based on the conditions set out by the Directive. As noted earlier, this screening process must cover all relevant rules of professional bodies or collective rules of professional associations or any professional organizations which are adopted in the exercise of their right to self-regulate their profession. Requirements to be reviewed equally include rules adopted at all levels of government. Ideally, this process should lead to strong harmonization forces to ensure equivalent protection across the Union and a certain level of mutual trust to eliminate obstacles to the freedom to provide services.⁵³

Harmonization with regard to rules of multidisciplinary partnerships will also decrease the compliance costs for those service suppliers which have already adopted this business model in one Member State, but who – due to restrictions in other Member States – cannot exercise their fundamental freedoms guaranteed by the Treaty.⁵⁴ In fact, nowadays the clientele is increasingly sophisticated and thus the delivery of a complete range of services, such as legal, accounting and tax advice within the same house, renders the latter fairly attractive.⁵⁵ Moreover, restrictions on such partnerships may be more justifiable in certain services than in others. Putting *Wouters* aside, it seems that there are feeble arguments justifying restrictions in partnerships between architects and engineers where the independence of professionals may not be as important as in other services, such as legal services or accounting, the homogeneity of which is contentious at best. From this perspective, minimum harmonization and the adoption of objective conditions across the Union appears to be com-

51. In *Wouters*, the Court emphasized that restrictions relating to the creation of multidisciplinary practices can be justified if the activities in question are not bound by comparable requirements of professional conduct, *in casu* of professional secrecy. See Case C-309/99, *Wouters*, [2002] ECR I-1577, para 104.

52. *Ibid.*, paras. 101–103. For the most important types of restrictions under this category, see European Commission report, cited *supra* note 1, 19.

53. See European Commission Proposal, cited *supra* note 9, 4.

54. See European Commission, “Extended Impact Assessment of Proposal for a Directive on Services in the Internal Market”, Commission Staff Working Paper, SEC(2004)21, 13 Jan. 2004, 20.

55. What the ECJ called “one-stop-shop advantage” in *Wouters*, cited *supra* note 51, para 87; also WTO, Council for Trade in Services, “Legal Services”, Background Note by the Secretariat, S/C/W/43, 6 July 1998, 14.

selling, as it enables economies of scale and allows the productivity of service suppliers to be enhanced through this type of synergy.

It follows that, although the Directive adopts a rather liberal approach *vis-à-vis* the content of CoC, allowing considerable room for manoeuvre to professional bodies to self-regulate their industry and establish deontological rules in co-ordination with their counterparts in other Member States, it adopts a more interfering stance towards the need for common rules relating to commercial communications and multidisciplinary practices. The semantics are obvious: the chances that these categories of rules hinder the establishment of a genuine internal market and distort competition are high and therefore particular attention and action at EU level is warranted.

2.5. *Additional functions of Codes of Conduct*

CoC can be used by courts as supplementary evidence or means of interpretation to corroborate a specific finding. For instance, in *Commission v. Luxembourg* and in *Wilson*, the Court referred to the CCBE Code of Conduct⁵⁶ to corroborate its argument that sufficient guarantees exist in the legal profession to minimize the risk of not imposing a prior test of knowledge of the national language, and thus consumer interests were adequately protected.⁵⁷ The judicial reference to CoC, notably when the proportionality of a given legislation is examined, can be another reason for professional associations to use them as a marketing tool,⁵⁸ i.e. to accentuate the importance and uniqueness of their profession for the entire society, which may justify a different treatment from State public regulatory authorities and courts at the national or, *in casu*, supranational level.⁵⁹

Thus, CoC serve an imperative function for a given services (sub-)sector: enunciating its professional norms and reassuring external parties (consumers, colleagues, the government and society as a whole) of the integrity, competence and the high standards enforced and maintained in the sector.⁶⁰ Rules incorporated in CoC aim to codify obligations that professionals have to abide by to deserve the trust of their clients and of society overall. By adhering to such standards, professionals become trustworthy. The CCBE Code of Conduct is

56. *Supra* note 34.

57. See Case C-193/05, *Commission v. Luxembourg*, [2006] ECR I-8673, para 44; *Wilson*, cited *supra* note 25, para 74. In the WTO context, see Panel Report, *EC – Tariff Preferences*, para 7.16.

58. See European Commission, “Instruments for a modernized single market policy”, SEC (2007)1518, 20 Nov. 2007, 12.

59. Cf. Art. 1.1 of the CCBE Code of Professional Conduct, cited *supra* note 34.

60. See Higgs-Kleyn and Kapelianis, “The Role of Professional Codes in Regulating Ethical Conduct”, 19 *Journal of Business Ethics* (1999), 364.

again revealing in this respect when it emphasizes the role of legal professional privilege, noting that “[c]onfidentiality is ... a primary and fundamental right and duty of the lawyer” and that “[w]ithout the certainty of confidentiality there cannot be trust”.⁶¹ Indeed, confidentiality and professional secrecy protect the client from indiscreet disclosures which may harm her integrity and reputation.⁶² Interestingly, the Code goes on to suggest that the respect of this principle not only serves the interest of the client, but also that of the administration of justice and therefore deserves to be protected by the State.⁶³ In *AM & S*,⁶⁴ the ECJ also concurred with this view and upheld the principle of confidentiality of written communications between lawyers and clients.⁶⁵ More generally, confidentiality and professional secrecy is “an obligation of discretion forming part of the ethics of a profession”.⁶⁶

Viewed from this angle, CoC also describe the conduct which the recipients of services are *entitled* to receive from the professionals abiding by the CoC and thus create expectations as to the quality standard for a given service. The role of the governing professional body is crucial on this score due to its autonomous, self-regulatory power and the control that it exerts over its members. Professional bodies are there to ensure that professional traditions are adhered to. In *Cipolla*, the Commission implicitly referred to rules included in CoC for the legal profession in a favourable manner. More specifically, it contended that

“quasi-legislative rules, such as, *inter alia*, rules on access to the legal profession, disciplinary rules serving to ensure compliance with professional ethics and rules on civil liability have, by maintaining a high qualitative standard for the services provided by such professionals which those measures guarantee, a direct relationship of cause and effect with the protection of lawyers’ clients and the proper working of the administration of justice”.⁶⁷

61. See Art. 2(3)(1) of the CCBE Code of Professional Conduct, cited *supra* note 34.

62. See Opinion of A.G. Maduro in Case C-305/05, *Ordre des barreaux francophones and germanophones and others*, [2007] ECR I-5305, point 41.

63. The ECtHR found that the right to a fair trial can also be violated in the case of disrespect of professional secrecy of lawyers. See ECtHR judgment on *Niemitz v. Germany* of 16 Dec. 1992, para 37. See also ECtHR judgment on *Foxley v. United Kingdom* of 20 June 2000, para 50.

64. See Case 155/79, *AM & S*, [1982] ECR 1575.

65. See also Joined Cases 125 & 253/03, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, [2007] ECR II-3523, para 120.

66. See Opinion of A.G. Maduro in *Ordre des barreaux francophones and germanophones and others*, cited *supra* note 62, point 37.

67. Joined Cases C-94/04 & C-202/04, *Cipolla*, [2006] ECR I-11421, para 63.

2.6. *Materializing the mandate and enforcing the CoC – a peculiar public-private partnership*

In all other respects, professional associations are called upon to set up pan-European CoC for their own discipline taking into account the peculiarities of their profession and ensuring that rules guaranteeing independence, impartiality, integrity and professional secrecy are agreed upon.⁶⁸ While, as noted earlier, the Directive remains silent as to the appropriate method for drawing up a CoC, the Commission draws attention to the significance of conforming to principles of good governance during that process.⁶⁹ The procedures should be open, publicly accessible, fair, non-discriminatory and objective. They should be communicated in advance to all stakeholders involved (including consumers) to ensure transparency, inclusiveness and representativeness.

Representativeness may be a key issue in drawing up pan-European CoC.⁷⁰ There are professions whose representation is clearly structured, so that ensuring representativeness for these professions at a European level may not be problematic. However, in other professions, ensuring representativeness in the creation of pan-European CoC may be thorny. First, there are activities, such as several non-regulated professions, which often do not have a representative professional organization at all. Second, disparities among Member States may exist to the effect that in some Member States no relevant professional association exists. Third, and quite inversely, in other service activities more than one professional association may be claiming eligibility for participation in drawing up pan-European CoC. In the latter case, while pluralism can in certain cases be beneficial, some co-ordination or even consolidation may be warranted to achieve optimal and expeditious results.

Along with ensuring representativeness, implementing the newly adopted pan-European CoC will also be a challenge for the principal actors in this effort. Clearly, it is for the Member State to take all the necessary measures to encourage professionals to implement these CoC at the national level. Of course, Member States are allowed to take more stringent measures if they consider that the level of protection adopted at EU level is not commensurate with domestic preferences and peculiarities. By the same token, domestic professional bodies can seek higher levels of protection in their existing or future national CoC.⁷¹ Viewed from this angle, pan-European and national CoC can co-exist and complement each other. Nevertheless, in order not to deprive the

68. See recital 114 of the Directive.

69. European Commission report, cited *supra* note 27, 10.

70. *Ibid.*, at 8.

71. See recital 115 of the Directive.

Directive and the mandate relating to the creation of pan-European CoC of its *effet utile*, Member States and/or professional bodies should be able to explain the particular situations that justify the stringency of the rules or conditions at the national level. The Commission, assisted by the Article 40 Committee,⁷² will be in charge of supervising the implementation of the Directive and receiving notifications as to changes in laws, regulations, and requirements adopted by both public bodies and private bodies which, in the exercise of their legal autonomy, are allowed to adopt rules in a collective manner.

The creation of CoC becomes a shared obligation of Member States and the Commission, which cannot be materialized without the active involvement of the private parties affected (or their associations) pursuant to Article 37. This tripartite approach aims to bring together the most important actors in the regulation of business services across the Union. Just as under Article 26, where Members are required to encourage action by private parties,⁷³ Article 37 requires that Member States, in co-operation with the Commission and obviously with associations representing service suppliers such as professional bodies or chambers of commerce as well as consumer associations, take practical steps so that service suppliers and professional associations create CoC at EU level to enable full use of the freedom to provide services and the freedom of establishment.

It bears mention that this privileged role of the Commission is ordained not only by its function as *Hüterin der Verträge* according to Article 211 EC (repealed and replaced in substance by Art. 17(1) TEU by the Lisbon Treaty),⁷⁴ but also in the aftermath of the Interinstitutional Agreement of 2003 on better law-making.⁷⁵ In this Agreement, a central role was entrusted to the Commission when recourse is made to alternative methods of regulation. Indeed, paragraph 17 of the Agreement provides that it is for the Commission to ensure that “any use of co-regulation or self-regulation is always consistent with Community [sic] law and that it meets the criteria of transparency (in particular the publicizing of agreements) and representativeness of the parties involved.” In this respect, the Commission conducted a public on-line consultation in summer 2007 inviting professional organizations to submit information on their current CoC in force or in preparation, if applicable, and to express their views as to the most adequate content of such codes within their respec-

72. Art. 40(1) of the Directive states “The Commission shall be assisted by a Committee”.

73. E.g., under Art. 26(1)(b), Member States, backed by the Commission, have to encourage service providers and their associations to draw up their own quality charters or labels at EU level. In addition, under Art. 26(5) of the Directive, the development of voluntary (obviously industry-driven) compatibility standards at EU level should be actively encouraged.

74. Case C-531/06, *Commission v. Italy*, [2009] ECR I-4103.

75. European Parliament/Council/Commission, “Interinstitutional Agreement on Better Law-making”, O.J. 2003, C 321/1.

tive disciplines. The involvement of the Commission is likely to become even more active when self-regulation substitutes for EU action in an area that comes under the competence of the EU, such as the creation and proper functioning of a genuine internal market for services. In addition, the Commission will report to the other EU legislating institutions on the successes or failures of this experimental regulatory power transfer.

A weakness of the Directive in its present form is that it does not set specific deadlines for the realization of the mandate. In the initial proposal submitted by the Commission, however, Article 40(2)(b) required that the Commission intervene to propose solutions in cases where “it has not been possible to finalize codes of conduct before the date of transposition [this would mean by the end of 2009] or for which such codes are insufficient to ensure the proper functioning of the Internal Market”. A more nuanced and flexible stance is adopted in the final text of the Directive whereby the role of the Commission is downgraded, whereas the optimistic plan of finalizing some pan-European CoC before 2010 is not reiterated. This absence of deadlines can be partly explained by the immense differences among services sectors that exist in reality with regard to co-ordinated efforts at EU level. Hence, choosing a less prescriptive approach was imposed by the reality. While 50 per cent of the European professional organizations have already drawn up a European CoC for their profession,⁷⁶ others are not that advanced or successful in their efforts to create such CoC.⁷⁷ In addition, one can infer that the Commission is not always satisfied with existing CoC, as several of them do not appear to have respected basic standards of transparency, participation, representativeness, integration or responsibility.⁷⁸ This would manifestly mean that, insofar as CoC created at EU level are explicitly warranted and the role of CoC should therefore be viewed henceforth from a new perspective, existing CoC would need to be revisited to ensure that they comply with fundamental principles of good governance.

76. See e.g. the code of the Architects' Council of Europe and the European Tax Federation.

77. See European Commission report, cited *supra* note 27, 10.

78. *Ibid.*

3. (European) governance without (European) government: Alternative methods of regulation

3.1. Contemporary law-shaping processes in the EU: Institutional foundations

The creation of pan-European CoC forms part of the non-legislative implementing measures that Member States are called upon to take when transposing the Directive. It also forms part of a broader paradigm shift in EU rule-making, dating back to the White Paper on European governance⁷⁹ and the Commission's Action Plan on better law-making.⁸⁰ Gradually, the European Union has moved towards and encouraged the introduction of new forms of governance, also driven by the notorious principle of subsidiarity⁸¹ and the Interinstitutional Agreement of 2003 on better law-making.⁸² Previously, the White Paper on European Governance submitted by the Commission in 2001, initiating its "Better Regulation Initiative", had also hinted at the way forward by recognizing that "legislation is often only part of a broader solution" and that non-binding rules can be equally important for the attainment of a given objective.⁸³ Such statements were in line with the paradigm shift in domestic administrative laws and practices across developed countries in Europe and North America towards less rigidity and more power-sharing with those parties which had been asked for so many years to abide by the law, without having been given a chance to participate or being asked for their views during its preparation.⁸⁴

Abandoning the previous rigid top-down approach and in a clear shift away from hierarchical forms of governing,⁸⁵ the Union has progressively adopted a new legislative culture according to which consultations (even with non-business stakeholders)⁸⁶ enhance the involvement of interested parties and improve the quality of the policy outcome,⁸⁷ whereas alternative modes of

79. European Commission, "European Governance – A White Paper", COM(2001)428, 25 July 2001.

80. See European Commission, "Action Plan 'Simplifying and Improving the Regulatory Environment'", COM(2002)278, 5 June 2002.

81. See also Lisbon European Council, Presidency conclusions, 23–24 March 2000, para 38.

82. European Parliament/Council/Commission, cited *supra* note 75.

83. *Ibid.*, 20.

84. Cf. Scott and Trubek, "Mind the Gap: Law and new approaches to governance in the European Union", 8 *ELJ* (2002), 8.

85. Craig and de Búrca, *EU Law – Text, Cases, and Materials* (OUP, 2008), p. 146.

86. European Commission communication, cited *supra* note 58, 19–20.

87. European Commission, "Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commis-

regulation of both legislative and non-legislative nature enacted at the periphery complement and sometimes replace legislative action at EU level to achieve the objectives more effectively.⁸⁸ Such instruments can be those provided by the Treaties, such as recommendations, but also emerging ones, such as co-regulation, self-regulation, voluntary sectoral agreements and codes of conduct, open method of co-ordination, financial assistance, or information campaigns.⁸⁹ The binary objective of diversifying the Union's regulatory instruments and simplifying and improving the regulatory environment is essentially driven by the concern to improve the effectiveness, legitimacy, transparency and legal certainty of regulation within the Union.⁹⁰ The experimentation with these instruments, nevertheless, must ensure swift and flexible regulation without affecting the EU competition rules or the unity of the internal market. Additionally, at the governance level, ensuring coherence and consistency regarding the use of soft-law tools and preserving the institutional balance among EU institutions is of paramount importance.⁹¹

The Interinstitutional Agreement of 2003 provides further clarification as to the scope of the instrument of self-regulation and the framework within which it is expected to be utilized. The Agreement defines self-regulation as "the possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines at European level". Contrary to co-regulation, self-regulation does not involve a legislative act and is essentially voluntary.⁹² Self-regulation leads to the creation of soft law, soft law being defined as "rules of conduct, that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects".⁹³

sion", COM(2002)704, 11 Dec. 2002, 5. The Lisbon Treaty formalizes and generalizes the duty of the Commission to consult with civil society "to ensure that the Union's actions are coherent and transparent". See Art. 11 TEU.

88. This is in accordance with the principle of subsidiarity which suggests that the EU has to legislate "only to the extent necessary". See Protocol No. 2 TFEU on the application of the principles of subsidiarity and proportionality.

89. See European Commission report, cited *supra* note 27, 7.

90. Walker and de Búrca, "Reconceiving law and new governance", 13 CJEL (2007), 519.

91. See the Medina Ortega Report, "on institutional and legal implications of the use of "soft law" instruments", available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0259+0+DOC+PDF+V0//EN> (last visited 1 Sept. 2009).

92. European Commission communication, cited *supra* note 58, 11. In the literature, however, several scholars consider the creation of CoC by the industry as a form of co-regulation. See, *inter alia*, Bignami, "Three generations of participation rights before the European Commission", (2004) *Law and Contemporary Problems*, 74.

93. Senden, *op. cit.* *supra* note 32, p. 112.

Self-regulation exemplifies the privatization of soft law.⁹⁴ It is more often than not a deliberate delegation of regulatory authority conceded by the State over a given activity to a body which is composed of representatives of that activity. As examples of self-regulation, the Agreement makes explicit reference to codes of practice and sectoral agreements.⁹⁵ The Agreement goes on to make clear that the choice of such a voluntary, decentralized instrument does not imply any preferred solutions by the EU institutions nor does it preclude any future action by them. For instance, the Agreement stipulates that recourse to a legislative act based on a proposal by the Commission may be warranted when the self-regulatory body fails to comply with the Treaties or when the competent legislative authority requests it. This is yet another piece of evidence that the Classic Community Method is hale and hearty. This recognition demonstrates that, at least potentially, regulations remain the ultimate powerful tool for fixing problematic situations across the Union. They constitute an instrument that the EU institutions are not ready to abandon so lightly – and justifiably so.

As noted earlier, the Commission's institutional role dictates that it closely supervises self-regulation practices to ensure compliance with the Treaty.⁹⁶ Notably, the Commission should ascertain the contribution of self-regulation practices to the achievement of the Treaty objectives, as well as their legitimacy. Whilst conventional legal theory would deny self-regulation a role equal to that of an independent source of law, the growing impact of private rule-making is part of contemporary reality and inevitably raises the issue of its legitimacy. In this regard, the Commission is bound to examine the extent of representativeness of the parties concerned, the sectoral and geographical cover and the added value of the commitments at stake.⁹⁷ Even so, concerns remain regarding this peculiar intersection which may be occurring between the Commission and powerful professional associations, which can be neither transparent nor comprehensible to the EU citizens, thereby creating a grey area of *de facto* legislating without democratic legitimacy.⁹⁸

At first blush, such a bottom-up approach may not be apposite when regulating services.⁹⁹ Contrary to the majority of goods, many services are considered

94. See Peters and Pagotto, "Soft law as a New Mode of Governance: A Legal Perspective" (2006), 5, available at <www.eu-newgov.org/database/DELIV/D04D11_Soft_Law_as_a_NMG-Legal_Perspective.pdf> (last visited 5 Sept. 2009).

95. Interinstitutional Agreement cited *supra* note 75, para 22.

96. Cf the EU self- and co-regulation database in the homepage of the European Economic and Social Committee (EESC), available at <eesc.europa.eu/self-and-coregulation/index.asp> (last visited June 2009).

97. Interinstitutional Agreement cited *supra* note 75, para 23.

98. Cf. Medina Ortega Report, cited *supra* note 91, 6.

99. Delimatsis, op. cit. *supra* note 7, p. 87.

as being “experience goods” or even “credence (or ‘trust’) goods”,¹⁰⁰ as their quality cannot be evaluated until they are consumed, or even years after the purchase took place, due to asymmetries of information between the service supplier (agent) and the consumer (principal). This information asymmetry may lead to adverse selection and a decline in quality as a result of competition based exclusively on price.¹⁰¹ Several professional services (e.g. legal, accounting, and notaries) also have the public good characteristics of non-rivalry and non-exclusivity. They are important not only for the smooth supply of other services but also for society and the unproblematic functioning of the economy overall.

Therefore, when the market itself does not sufficiently protect the relevant values, political decision-making proceeds to an evaluation of the situation in the market and, ultimately, it overrides it.¹⁰² More specifically, the governmental intervention will prescribe the type of information that needs to be provided and will aid potential buyers to evaluate the information being supplied. Licensing, certification procedures, minimum harmonization, or liability laws are the usual governmental instruments to ensure competence, performance, technical behaviour and accountability.¹⁰³ The primary advantage of legislation, then, is that, due to its inherently coercive qualities, it can improve resource allocation or aid in obtaining other benefits in cases where markets are incapable of achieving these objectives on their own. Practice, however, shows that governmental failures have led to a disappointing picture of the services supply landscape within the Union, with several instances evidencing ineffective and undecided steps towards integration.

3.2 *Self-regulation, professional services and (limited) harmonization*

To be sure, self-regulation may be the ultimate form of regulatory capture and delegating regulatory power to professional bodies can constitute legitimization of a cartel with wide ability to determine or influence the regulatory

100. See Nelson, “Information and consumer behavior”, 78 *Journal of Political Economy* (1970), 311; also Akerlof, “The market for ‘lemons’: Quality uncertainty and the market mechanism”, 84 *Quarterly Journal of Economics* (1970), 488; also Darby and Karni, “Free Competition and the Optimal Amount of Fraud”, 16 *Journal of Law and Economics* (1973), 67. Darby and Karni actually demonstrate that in the case of goods that have credence qualities, governmental intervention would not lead to an efficient allocation of resources and thus it would be preferable to leave the market unregulated.

101. Cf. Akerlof, op. cit. *supra* note 100.

102. If the market remains unregulated, this would lead to a lowering of standards, as consumers would not be able to distinguish between low-quality and high-quality services. See also Ogus, *Regulation: Legal Form and Economic Theory* (OUP, 1994), p. 216.

103. Also OECD, “Competition in Professional Services”, DAF/CLP(2000)2, 2000, 18.

framework and access to the profession to the benefit of professionals/members of the “club” but to the detriment of consumers.¹⁰⁴ Case law has pointed to this risk of having competitors deciding on the application of potential newcomers.¹⁰⁵

Nevertheless, the Directive clearly makes a decisive move away from command-and-control regulation, by adopting a mix of regulatory techniques. These techniques rang from targeted harmonization where divergences are too wide to be maintained, to alternative methods of regulation where the Union recognizes the reality of self-regulation in many business services. This is the case in the field of professional CoC where the Directive calls upon individuals concerned and their associations to participate in rules-shaping and to decide on a common, pan-European set of rules on professional ethics and conduct of a non-coercive nature which would suit them best.¹⁰⁶

A public-interest theory approach would also suggest that conceding regulatory powers to the suppliers concerned would be the most cost-efficient solution due to the specialized knowledge of the professionals and their organized bodies, notably when it comes to distinguishing between high-quality and poor-quality services and service suppliers, but also because of the professionals’ ability to react more quickly and flexibly to new circumstances and adapt or revise their rules.¹⁰⁷ In addition, this alternative method of regulation is likely to allow greater room for input, adaptation, and revision both on the part of those creating the rules and those subjected to the rules. Moreover, the choice of this type of instrument leads to wider ownership of the policies at stake, which appears essential when it comes to enforcement and compliance with rules of a *non-binding* nature.

CoC have been traditionally viewed with suspicion, as an attempt of the industries concerned to forestall State interference.¹⁰⁸ However, we can no longer turn our back on reality: as Cutler puts it, “a growing asymmetry or

104. Cf. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965).

105. See e.g. Case C-439/99, *Commission v. Italy*, [2002] ECR I-305, paras. 39–40. This case law is reflected in Art. 14(6) of the Directive. Under the WTO, in the case *Argentina – Hides and Leather*, the Panel found that, by allowing competitors having their own commercial interests to be implicated in the process of deciding on exportation and to have access to confidential business information, a State violated its obligation under Art. X:3(a) GATT to administer its measures in a reasonable and impartial manner.

106. See European Commission Proposal, cited *supra* note 9, 9.

107. The Mandelkern Report used as ultimate criterion the satisfaction of the user and suggested that public intervention may be warranted only when the user is not satisfied. See Mandelkern Group on Better Regulation – Final Report, 2001, 14–15.

108. For this opinion, as it applies to the self-regulation of the legal profession, and why in this sector co-regulation may be preferable, see Zacharias, “The Myth of Self-Regulation”, 93 *Minnesota Law Review* (2009), 1173.

disjuncture between the formal legal status of private participants and their actual, political significance is growing more acute, portending a crisis of legitimacy".¹⁰⁹ Nowadays, legitimizing influential rules set out in the exercise of private authority which may by now be *de facto* binding and complied with by the individuals/members of the professional associations, becomes pressing. Instead of trying to ignore their existence and prominent role in the everyday exercise of manifold professions and applying policies of exclusion, contemporary demands of participatory democracy would rather require an inclusive approach leading to the integration of these voices in rule-making and rule-shaping.¹¹⁰ Whereas allowing professional bodies to regulate their own matters boils down to a question of social coherence, this upgrading of the role of private authority also calls for reforms and restructuring to ensure compliance with current demands for internal and external transparency, due process, legitimacy, accountability, fairness and inclusiveness. Such reforms also seem to be warranted in the process of implementing the Directive at the national level. Indeed, the Directive includes several important transparency obligations referring to the conduct of the competent authorities. The definition of "competent authority" is sufficiently comprehensive to include "professional bodies, and those professional associations or other professional organizations which, in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof".¹¹¹

Another, perhaps more practice-oriented justification inherent in the mandate for the creation of pan-European CoC is the internationalization of the professions and the subsequent relativization of borders and jurisdictions.¹¹² The desire inherent in this mandate is that, where EU institutions and politics have largely failed, private rule-making may provide solutions that will come from the fated need of the business to expand across borders and the increasing demands of customers for first-rate delivery of services regardless of geographical borders and competent *fori*.

Regarding harmonization of professional standards, the EU gradually replaced its strategy of adopting harmonization legislation enshrined in vertical directives during the 1970s and mid-1980s with horizontal directives, applying across services sectors.¹¹³ Those horizontal directives came in the

109. See Cutler, *Private Power and Global Authority – Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003), p. 195.

110. After all, participation is one of the five principles of good governance identified in the Commission's White Paper on Governance.

111. See Art. 4(9) of the Directive.

112. Cf. with respect to legal services, *Commission v. Luxembourg*, cited *supra* note 57, para 45.

113. Directives 89/48, O.J. 1989, L 19/16; and 92/51, O.J. 1992, L 209/25.

aftermath of important decisions delivered by the Court relating to the principle of mutual recognition.¹¹⁴ However, the general system directives fell short of ensuring recognition; rather they obliged Member States to take into account qualifications and, if needed, impose additional requirements to achieve equivalence with nationals holding national titles. The new directive on the recognition of professional qualifications, replacing all previous ones, is aimed to introduce a more flexible and automatic procedure which uses as a basis common platforms established by professional associations.¹¹⁵ As a result of Directive 2005/36/EC on the recognition of professional qualifications, significant reforms in all EU Member States regarding professional services were discussed with a view to fostering competition.¹¹⁶ By recognizing the professional qualifications of a given individual, the host Member State allows her to gain access in that Member State to the profession for which she is qualified in her home Member State and to pursue it under the same conditions as the nationals. The profession can be considered as being the same if the activities are “comparable”.

In cases falling outside the scope of the horizontal directive, the principles outlined by the ECJ in *Gebhard*, *Heylens*, *Vlassopoulou*, *Aranitis* and *Bobadilla* will still apply. This means that EU primary law continues to give guidance as to the proper *modus operandi*.¹¹⁷ Indeed, as underlined in *Dreessen*, the object of the horizontal directives on recognition of qualifications should not be “to make recognition of diplomas, certificates and other evidence of formal qualifications more difficult in situations falling outside their scope, nor may they have such an effect”.¹¹⁸ More specifically, Article 49 TFEU requires that the national competent authorities take into consideration the knowledge, diplomas, certificates, qualifications and experience already recognized or acquired in another Member State, give adequate reasons in case of non-recognition and allow for access to an effective judicial remedy. A similar type of comparison may also be warranted in the case of EU nationals who have acquired formal qualifications and practical experience in a third country.¹¹⁹ In practice,

114. Most notably, Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] ECR 649; and Case C-340/89, *Vlassopoulou*, [1991] ECR I-2357. See on recent developments on the principle of mutual recognition Möstl, “Preconditions and limits of mutual recognition”, 47 CML Rev., 405–436.

115. Barnard, *The Substantive Law of the EU – The Four Freedoms* (OUP, 2007), p. 323.

116. Several of these proposed reforms have been discussed in the European Commission, “Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services”, Commission Staff Working Document, COM(2005)405 final, 5 Sept. 2005.

117. See, for instance, *Commission v. Italy*, cited *supra* note 74, paras. 35, 37.

118. Case C-31/00, *Dreessen*, [2002] ECR I-663, para 26.

119. See, *inter alia*, Case C-238/98, *Hocsman*, [2000] ECR I-6623, para 35.

the Court will undertake a very broad interpretation of the fundamental freedom enshrined in Article 49 to outlaw any requirement which is liable to hinder or make less attractive the exercise of the right of establishment unless it is justified based on legitimate policy grounds and proportionate to the objective pursued.¹²⁰

4. Applicability of Articles 49 and 56 TFEU to private action

In the universe of non-legislative, voluntary instruments adopted by private actors such as professional CoC, the question of the possibility for the private parties affected to have recourse to legal remedies becomes pressing. Just as other soft-law instruments, CoC can support a normative discourse similar to hard law. While violations of legal obligations are perhaps more striking, soft undertakings can stimulate “accountability politics” provided that they entail manifest normative commitments.¹²¹ Thus a strategy of “name and shame” can be very effective, notably in the area of professional services where individualism and personal reputation are still significant. As the boundaries between State, legally binding action and private, essentially voluntary action are increasingly blurred and private authority sometimes emerges as a law-maker of similar effectiveness to public authority, the scope *ratione materiae* and the value of the fundamental freedoms is growing. It is commonplace now that the fragmentation of the internal market for services is also the inevitable result of the divergent standards adopted by non-public bodies in Member States, such as professional associations, sport federations, the social partners drawing up collective agreements, or interested parties or groups drawing up CoC or collective rules in the exercise of their legal autonomy.

Settled case law of the ECJ makes clear that circumventing the abolition of State barriers to market integration through obstacles stemming from rules (or the application thereof) set out by associations or organizations not governed by public law that are entrusted with broad legal autonomy and regulatory power cannot be allowed.¹²² Indeed, rules of *any* nature set out by private bodies aimed at regulating gainful (self-) employment and the supply of services in a collective manner can impede the functioning of the internal market and

120. See Case C-108/96, *Mac-Quen*, [2001] ECR I-837, paras. 24–26; and Case C-370/05, *Festersen*, [2007] ECR I-1129, para 26.

121. See Abbott and Snidal, “Hard and soft law in international governance”, 54 IO (2000), 452.

122. Case 36/74, *Walrave*, [1974] ECR 1405, paras. 17, 23–24; Case 13/76, *Donà*, [1976] ECR 1333, paras. 17, 18; Case C-415/93, *Bosman*, [1995] ECR I-4921, paras. 83–84; Case C-176/96, *Lehtonen*, [2000] ECR I-2681, para 35; *Wouters*, cited *supra* note 51, para 120.

thus come within the purview of the fundamental freedom provisions of the Treaty.¹²³

Recognizing that the activities of market participants can be restricted not only by action taken by Member States' authorities but also by private action, the ECJ interpreted the fundamental freedoms in a broad manner with a view to enabling market participants to have adequate judicial protection and equal opportunities to gain access anywhere in the EU.¹²⁴ Hence, the traditional approach that horizontal effect was only applicable with regard to the rules of competition, whereas the rules on free movement only had vertical effect was abandoned.¹²⁵ In *Walrave and Koch*, for instance, the ECJ ruled that "the rule of non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place they are entered into or the place where they take effect, can be located within the territory of the Community [sic]".¹²⁶ Furthermore, the ECJ found that the provisions on the free movement of workers had not only vertical, but also horizontal effect in *Clean Car*¹²⁷ and *Angonese*,¹²⁸ noting that application of Article 39 EC (now 45 TFEU) only to public authority acts would disregard the fact that working conditions are typically governed both by public law and rules adopted by private persons. Thus, these rulings extended the *Defrenne* case law¹²⁹ into the area of free movement of workers.

The attempt of the ECJ to adopt a coherent approach towards the acceptance of the horizontal effect of the fundamental freedoms is more than obvious. In *Schmidberger*,¹³⁰ the Court had found that private action should be subject to the provisions on the free movement of goods. In this case, it applied horizontally the fundamental freedom by balancing the fundamental right to freedom of expression of a group of individuals who were demonstrating, against the right of a transport company to exercise its rights deriving from the Treaty relating to the free movement of goods.¹³¹ Even if the action in *Schmidberger* was a case of State liability, the facts in the record suggest that the State was the third party in a situation where the constitutional rights of

123. Case C-519/04, *Meca-Medina v. Commission*, [2006] ECR I-6991, para 24.

124. See also Edward and Nic Shuibhne, "Continuity and change in the law relating to services" in Arnall, Eeckhout, and Tridimas (Eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (OUP, 2008), p. 243.

125. See e.g. Case 41/74, *Van Duyn*, [1974] ECR 1337, paras. 4–8.

126. *Walrave*, cited *supra* note 122, para 28.

127. Case C-350/96, *Clean Car*, [1998] ECR I-2521, paras. 19–21.

128. Case C-281/98, *Angonese*, [2000] ECR I-4139, paras. 33–34, 36.

129. Case 43/75, *Defrenne*, [1976] ECR 455, paras. 31 and 39.

130. Case C-112/00, *Schmidberger*, [2003] ECR I-5659, paras. 57 and 62.

131. See also Case C-265/95, *Commission v. France*, [1997] ECR I-6959, para 30.

one private party were jeopardized by the actions of another private party.¹³² In *Viking Line*,¹³³ the ECJ had to decide, *inter alia*, on the horizontal effect of Article 43 EC (now 49 TFEU) on the freedom of establishment, i.e. whether a private undertaking can derive rights from this provision on which it can rely against a trade union or an association of trade unions. As expected, the ECJ had no difficulty in confirming the application of its settled case law relating to horizontal effect also in the case of Article 49 TFEU *mutatis mutandis*.¹³⁴ The ECJ suggested that the collective action taken by the trade unions and the association thereof is liable to restrict the exercise of the freedom of establishment by another private party and thus violates Article 49 TFEU.¹³⁵ In previous cases, the ECJ applied the free movement provisions to private action notably when its aim was to bear on working conditions and access to employment¹³⁶ or in the case of sport associations due to their powerful influence over the organization of professional sports.¹³⁷

In *Viking Line*, it is argued that the ECJ was willing to protect the economic freedom of the *employer*. As the Advocate General Maduro noted, “the possibility for a company to relocate to a Member State where its operating costs will be lower is pivotal to the pursuit of effective intra-Community [sic] trade”.¹³⁸ A similar conclusion seems to be apposite in *Laval*.¹³⁹ In this case, the ECJ accepted the horizontal direct effect of Article 49 EC (now 56 TFEU) by underscoring, based on the aforementioned case law, that rules which are designed to regulate collectively the provision of services cannot escape the scope of the freedom to provide services by the simple fact that they are not public in nature.¹⁴⁰ Confirming its stance in *Viking Line*, the ECJ again appeared to balance the conflicting rights (fundamental freedom against fundamental rights to protect workers against social dumping) in favour of free movement. In this case, however, it was more eloquent than in *Viking Line*. Whilst in the latter, the ECJ suggested that it is for the national court to undertake the proportionality test, in *Laval* the ECJ, in light of the severity of the means

132. For an excellent account of this issue, see A.G. Maduro’s Opinion in *Viking Line: Case C-438/05, The International Transport Workers’ Federation and the Finnish Seamen’s Union*, [2007] ECR I-10779.

133. *Ibid.*

134. *Ibid.*, para 61.

135. *Ibid.*, paras. 72–73.

136. *Angonese*, cited *supra* note 128; and Case C-438/00, *Deutscher Handballbund*, [2003] ECR I-4135.

137. For the relevant case law, see *supra* note 122.

138. See A.G. Maduro’s Opinion in *Viking Line*, cited *supra* note 132, point 57; the ECJ confirmed this view in para 72 of the judgment.

139. Case C-341/05, *Laval*, [2007] ECR I-11767.

140. *Ibid.*, para 98.

chosen by the domestic trade union (i.e. a blockade of sites), decided to undertake the proportionality test itself, in order to conclude that it was not met, based on the safety net already provided by Directive 96/71 on posting of workers and on the obscurity or the absence of any provisions at all at a national level specifying the obligations of employers with respect to minimum pay. However, it would be erroneous to consider that the ECJ adopted a human-rights- or labour-unfriendly stance. Arguably, the rulings of the ECJ are strictly fact-specific and should not be used to draw more general conclusions as to social protection within the Union. On the other hand, it would be safe to say that the ECJ is not prepared to overrule light-heartedly a restriction on the fundamental freedoms, notably when their application may ensure an optimal allocation of resources throughout the Union.

It follows from the previous discussion that the ECJ, by rather focusing on the activity at stake, is determined to outlaw any provision of any nature which could be capable of preventing or deterring an EU citizen from leaving her home country to exercise her right to freedom of movement. Any signal of disadvantaging nationals of another Member State in the territory of a given Member State, which subsequently impedes or renders less attractive the use of the Treaty's constitutional rights, can be sufficient to trigger the application of the free movement provisions.¹⁴¹

In *Mobistar*, for instance, the ECJ submitted that rules which have the effect of making the provision of services between Member States more difficult than the provision of services within one Member State are to be outlawed.¹⁴² When exercise of fundamental rights is in conflict with the exercise of the freedom of movement, the Court will attempt to strike a balance based on the facts of the case and the interests at stake – neither fundamental rights nor fundamental freedoms are absolute.¹⁴³ The Court is willing to take up this daunting task, absent any serious attempt by the State to resolve the matter in a satisfactory manner. The Court's case law hints at the need for a more pro-active and reflexive reaction from the State when such issues are raised to avoid recourse to judicial means. Indeed, Member States can and should interfere with private rules through appropriate legislation or court decisions

141. Case C-442/02, *CaixaBank France*, [2004] ECR I-8961, para 11.

142. Case C-545/03, *Mobistar*, [2005] ECR I-7723, para 30.

143. To corroborate this view, see Art. 52(1) of the Charter of fundamental rights of the European Union, which provides that: "[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others". See also A.G. Maduro's Opinion in *Viking Line*, cited *supra* note 132, point 23.

at any time. Given the risk of bias that may characterize private rules, such State intervention may become essential in restoring the balance of rights and obligations or complying with the obligations enshrined in the Treaty.

Interestingly, however, this may not be the end of the story for our purposes of examining the consistency with EU law of restrictions based on CoC. Even if non-discriminatory, a restriction on free movement cannot be sustained unless it pursues an EU-consistent legitimate objective, is justified by overriding reasons of public interest and complies with the proportionality principle. In *Gebhard*,¹⁴⁴ and more recently in *Wouters*, the Court found or implied that national measures liable to hinder or make less attractive the exercise of the right to free movement can be justified, based, *inter alia*, on professional ethics considerations. Hence, the protection of professional ethics can be considered as a legitimate, overriding reason of public interest.¹⁴⁵ It follows that when examining the compliance of CoC rules with EU rules on fundamental freedoms, the rules of professional conduct and ethics will be examined as a justification of the violation of free movement rules.

Therefore, what would seem to be of paramount importance under this constellation is the extent to which the measure that allegedly substantiates or is based on a rule of ethics and conduct complies with the principle of proportionality, that is, it is suitable for the attainment of the objective pursued and does not go beyond what is necessary in order to attain it.¹⁴⁶ Again, government rules may override compliance with such ethical rules. For instance, in the case of an organized campaign to combat illegal activities, such as money laundering, limitations to the principles of confidentiality and professional secrecy can be considered as proportionate and justified.¹⁴⁷

144. *Gebhard*, cited *supra* note 19.

145. Or rules justified by the “general good”. See also Cases 33/74, *Van Binsbergen*, [1974] ECR 1299, para 12; and 71/76, *Thieffry*, [1977] ECR 765, para 12. See, by analogy, in regard to the reputation of a given services sector. Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, paras. 42–44.

146. See, *inter alia*, *Bosman*, cited *supra* note 122, para 104. This proportionality test will be much more flexible in cases where the professionals at issue are the agents of protecting an important policy objective such as public health within the sphere of competences retained to the Member States. See Joined Cases C-171 & 172/07, *Apothekerkammer des Saarlandes*, [2009] ECR I-4171, judgment of 19 May 2009, *nyr*. In this case, the Court suggested, *inter alia*, that the double nature of the pharmacists, i.e. the fact that they operate a pharmacy not only to make profit, but also as professionals bound by the rules of law and professional conduct, may justify a restriction allowing only to pharmacists to own and operate pharmacies. According to the Court, moderating factors inherent in their function make them special when compared to non-pharmacists.

147. See *Ordre des barreaux francophones and germanophones and others*, cited *supra* note 62, and the Opinion of A.G. Maduro in this case.

5. The relevance of EU competition rules

Rules of professional conduct laid down in CoC come within the scope of EU competition law, as they organize and influence the exercise of a given profession.¹⁴⁸ The compatibility of rules contained in CoC with EU law may be contentious when examined through the lens of competition law. Such an examination is however necessary to ensure that equally competitive conditions are offered to the economic operators active in the EU market, and that rules enshrined in CoC do not prescribe certain types of behaviour which have anti-competitive effects.¹⁴⁹

There are five principal categories of rules relating to professional services that may be inconsistent with EU competition rules. These relate to: price fixing; recommended prices and minimum fees;¹⁵⁰ restrictions relating to commercial communications; entry requirements and reserved rights; and regulations relating to legal form, ownership and multi-disciplinary practices.¹⁵¹ In several instances, professional bodies have included these types of restrictions in their CoC and linked them to the proper conduct of the profession or the interests of the consumer.¹⁵² Empirical studies suggest that the theoretical perception alleging that a causal link exists between heavy regulation and better quality of professional services supplied does not hold.¹⁵³ Economic theory further demonstrates that delegating regulatory authority, i.e. granting to a professional body a monopoly right to self-regulate the pursuit of a professional service and thus allowing it to restrict entry to the profession, would generate important economic rents in the form of excess revenues for the incumbents. Prices in this case will be higher without there being any indication of quality improvement. For instance, in *Cipolla*, the Commission argued that no causal link has been established between the setting of minimum levels of fees and a high qualitative standard of legal services.¹⁵⁴ Therefore, it is worth examining the applicability of EU competition rules to the rules that a professional CoC may comprise.

In *Meca-Medina*, the Court made it explicit that, even in the absence of economic activity, the non-application of the provisions on free movement

148. Case T-144/99, *Institut des mandataires agréés*, [2001] ECR II-1087, para 64.

149. Case C-49/07, *MOTOE*, [2008] ECR I-4863, para 51.

150. See also recital 73 of the Directive.

151. European Commission, "Report on Competition in Professional Services", COM(2004) 83, 9 Feb. 2004, 3.

152. See, more recently, the Commission Decision of 24 June 2004 on the recommended prices for Belgian architects, case COMP/38.2549.

153. OECD, cited *supra* note 103.

154. *Cipolla*, cited *supra* note 67.

does not exclude the application of Articles 81 and 82 (now 101 and 102 TFEU, respectively).¹⁵⁵ Rather, a separate analysis should be undertaken to examine whether (1) the rules governing the activity are created by an undertaking; (2) this undertaking restricts competition or abuses its dominant position; and (3) this restriction or abuse affects intra-EU trade.

The concept of an undertaking under EU law is relative.¹⁵⁶ In *Wouters*, the Court ruled that lawyers are undertakings within the meaning of the EU competition law, as they offer services for remuneration, and bear the financial risks that failures may entail.¹⁵⁷ By the same token, in *CNSD*¹⁵⁸ customs agents were considered as undertakings, whereas in *Pavlov*¹⁵⁹ medical specialist doctors also came under this term. This would obviously apply to the overwhelming majority of professional service suppliers. Furthermore, *à la Wouters*, the professional body should be considered as an association of undertakings that adopts a collusive behaviour pursuant to Article 101 TFEU in that it influences the conduct of its members on the market in the relevant services sector and directs them to act in a particular manner when they carry their economic activity.¹⁶⁰ Thus, rules created in the exercise of the body's regulatory autonomy such as the adoption of CoC (or of certain rules therein such as those relating to advertising or minimum/maximum fees) constitute a decision adopted by an association of undertakings within the meaning of Article 101(1) TFEU.¹⁶¹

Like the concept of undertaking, the notion of an "association of undertakings" is relative.¹⁶² Sufficient governmental involvement and mixed situations entailing public-private cooperation where the observance of pre-defined public interest criteria is warranted shields the body governing professional conduct from the purview of Article 101.¹⁶³ Nonetheless, the standard of review will be fairly strict in assessing the role of public authority in the measure under scrutiny. In *Van Eycke*, and later in *Arduino*, the ECJ clarified that a violation of Articles 10 and 81 EC (now 4(3) TEU and 101 TFEU, respectively) occurs (a) when a Member State divests its rules of legislative character through delegation to private economic actors of the responsibility to take decisions

155. *Meca-Medina*, cited *supra* note 123, paras. 30–31.

156. Cf. Case C-41/90, *Höfner and Elser*, [1991] ECR I-1979.

157. *Wouters*, cited *supra* note 51, para 49.

158. Case C-35/96, *Commission v. Italy (CNSD)*, [1998] ECR I-3851, para 37.

159. Case C-180/98, *Pavlov*, [2000] ECR I-6451.

160. *Wouters*, cited *supra* note 51, paras. 63–64.

161. *Ibid.*, para 71. Also *Institut des mandataires agréés*, cited *supra* note 148, para 62. Interestingly, in this ruling, the General Court found that an outright prohibition of comparative advertising incorporated in a CoC can violate Art. 101 TFEU. *Ibid.*, para 79.

162. See Vossestein's annotation of *Arduino* and *Wouters*, 39 CML Rev. (2002), 853.

163. Case C-35/99, *Arduino*, [2002] ECR I-1529, paras. 37–39.

affecting the economic sphere, or (b) when a Member State requires or even encourages collusive behaviour contrary to Article 101 or reinforces its effects.¹⁶⁴

Any activity, in turn, consisting of offering goods or services in a given market is deemed an economic activity.¹⁶⁵ An association of undertakings can itself be an undertaking if it performs such an economic activity. An entity such as a professional association can partially exercise public authority and thus not come under the purview of the competition rules, but still be subject to the competition rules if it undertakes additional activities within a competitive market on which a number of undertakings act in competition.¹⁶⁶ However, entities whose activities are exclusively social or of public interest and are not pursued in competition with other economic agents in the relevant market are excluded from the scope of competition rules.¹⁶⁷

Decisions that affect trade between Member States¹⁶⁸ and *de facto* or *de jure* prevent, restrict or distort intra-EU competition are void by virtue of Article 101(2). The so-called intra-community clause is, again, interpreted broadly.¹⁶⁹ The relevant market can be the domestic market only or even certain regions thereof.¹⁷⁰ This last element may be of particular importance for associations which are active at the sub-national level. Of particular importance is the attempt to identify those practices which are capable of constituting a threat to freedom of trade among Member States¹⁷¹ in a manner which might harm the attainment of the objectives of the single market, notably by partitioning of markets on a national basis or hindering the economic interpenetration in contrast to the objectives of the Treaty. In *CNSD*, the Court clarified that agreements extending over the whole of the territory of a Member State have, *by their very nature*, such an effect.¹⁷²

164. *Ibid.*, para 35; and Case 267/86, *Van Eycke*, [1988] ECR 4769, para 16; also *Mauri*, cited *supra* note 25, paras. 29–37.

165. *MOTOE*, cited *supra* note 149, para 22; Case C-264/01, *AOK Bundesverband*, [2004] ECR I-2493, paras. 50, 58.

166. For instance, the city of Trier was deemed an undertaking. See Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089.

167. Case C-222/04, *Cassa di Risparmio di Firenze*, [2006] ECR I-289, paras. 120–121.

168. This is an autonomous criterion that needs to be assessed separately. See Joined Cases 56 & 58/64, *Consten and Grundig*, [1966] ECR 429. See also the Commission's Guidelines on the effect on trade concept contained in Arts. 81 and 82 of the Treaty, O.J. 2004, C 101/81.

169. Case C-295/04, *Manfredi*, [2006] ECR I-6619, para 42.

170. *Ambulanz Glöckner*, cited *supra* note 166, para 38.

171. Case law confirms that effects are essentially immaterial. See Case C-55/96, *Job Centre*, [1997] ECR I-7119, para 36.

172. *Commission v. Italy (CNSD)*, cited *supra* note 158, para 48.

Nevertheless, these provisions do not aim to penalize every single agreement or decision that restricts the freedom of action of the parties or of one of them. Article 101 is to be interpreted in a manner that accommodates EU or national policies which are non-economic in nature.¹⁷³ Thus, courts should juxtapose the anti-competitive effects against the objectives of the agreements or decisions and the overall context in which the agreements or decisions are concluded or produce their effects. Furthermore, they should examine whether the consequences which restrict competition are in fact inherent in the pursuit of those objectives and are limited to what is necessary to ensure the proper conduct of the profession, as it is organized in the Member State at stake.¹⁷⁴ In this analysis, then, the peculiarities of the domestic market and of the specific profession will have a central role.¹⁷⁵ In *Institut des mandataires agréés*, for instance, the General Court opined that the rule enshrined in the CoC at stake had to be assessed against “its impact on the freedom of action of the members of the profession and on its organization and also on the recipients of the services in question.”¹⁷⁶

In *Wouters*, the ECJ found that outright prohibitions of multidisciplinary practices in the legal profession are inconsistent with Article 101(1)(b) because they are liable to limit production and technical development,¹⁷⁷ as they do not allow the exploitation of the one-stop-shop advantage, the supply of “full service” and the possible diminution of costs. However, the ECJ submitted that the rules at issue were designed to ensure the proper conduct of the profession and the sound administration of justice and therefore were justified and proportionate, thereby striking a balance between the anti-competitive behaviour and the pursuit of non-economic legitimate objectives which may, however, have pro-competitive effects.¹⁷⁸ By the same token, anti-doping rules,

173. See Nazzini, “Article 81 EC between time present and time past: A normative critique of ‘restriction of competition’ in EU Law”, 43 CML Rev. (2006), 503. *Contra* Odudu, *The Boundaries of EC Competition Law – The Scope of Article 81* (OUP, 2006). See also Case C-67/96, *Albany*, [1999] ECR I-5751, paras. 52–60.

174. *Meca-Medina*, cited *supra* note 123, paras. 42, 47; and *Wouters*, cited *supra* note 51, para 97.

175. *Cipolla*, cited *supra* note 67, para 68.

176. *Institut des mandataires agréés*, cited *supra* note 148, para 65.

177. *Wouters*, cited *supra* note 51, para 90.

178. There is controversy as to whether the ECJ accepts the existence of a “rule of reason” under Art. 101(1) TFEU by adopting this reasoning, which suggests that it is necessary to weigh up the anti-competitive against the pro-competitive effects. See Manzini, “The European rule of reason: Crossing the sea of doubt”, 23 ECLR (2002), 392. Also Monti, “Article 81 and public policy”, 39 CML Rev. (2002), 1087. Such an interpretation also exemplifies a tendency to apply Art. 101 based on the methodology of jurisprudence relating to free movement. See O’Loughlin, “EC competition rules and free movement rules: An examination of the parallels and their furtherance by the ECJ *Wouters* Decision”, 24 ECLR (2003), 62. In *Métropole*, the General Court

while *prima facie* restrictive of competition, were justified because they were designed to ensure fair rivalry among athletes and complied with the principle of proportionality. State compulsion can also function as a defence under Article 101. It cannot, however, be invoked when the national law merely allows, encourages or makes it easier for undertakings or associations to engage in autonomous anti-competitive conduct.¹⁷⁹

It remains to be examined whether, when adopting rules enshrined in CoC, the professional associations can act inconsistently with Article 102 TFEU relating to a dominant position.¹⁸⁰ Importantly, in *MOTOE*, the Court clarified that an undertaking can, *inter alia*, acquire a dominant position when it is granted special or exclusive rights enabling it to determine whether and under what conditions other undertakings can have access to the relevant market and supply their services.¹⁸¹ It further found that Articles 82 and 86(1) (now 102 and 106 TFEU, respectively) are violated when the fact that such rights within the meaning of Article 86(1) (now 106(1) TFEU) are granted is liable to create a risk of an abuse of a dominant position.¹⁸²

By analogy, a professional association which has been granted the power to self-regulate the conditions of a given professional activity as well as the power to decide on the well-foundedness of the applications for authorization to exercise a given professional activity could be considered an undertaking to

contended that a balancing of anti- and pro-competitive effects can only be accepted under the narrow confines of Art. 101(3) TFEU. Case T-112/99, *Métropole télévision (M6)*, [2001] ECR II-2459, para 74. See also the Commission's "Guidelines on the Application of Article 81(3) of the Treaty", O.J. 2004, C 101/98, para 11. Nazzini argues that this type of balancing is different from the one under the *Wouters* test. Under Art. 81(1) EC, welfare-enhancing effects are to be balanced against welfare-reducing effects to estimate the net effect of the agreement on consumer welfare. Under Art 81(3) EC, however, it is the net welfare-reducing effects that need to be balanced against productive efficiencies. Thus, the exception of Art. 101(3) TFEU is not deprived of its meaning. Nazzini, op. cit. *supra* note 173, 519; but see Jones and Sufrin, *EC Competition Law*, 3rd ed. (OUP, 2008), pp. 267–268. Arguably, the ECJ was convinced that the rules at issue in *Wouters* were welfare-enhancing and thus pro-competitive (paras. 85, 91–93). It is worth noting that the US Supreme Court found that ethical rules can promote competition and thus fall within the rule of reason: see *National Society of Professional Engineers v. US*, 435 US 679 (1978). See also the Opinion of the A.G. Léger in *Wouters*, cited *supra* note 51, para 112. Other commentators take the view that the *Wouters* case law is a reflection of the "ancillary restraints" concept, i.e. restraints on conduct which appear to restrict competition nevertheless do not infringe Art. 101(1) TFEU if they are ancillary to some legitimate purpose. See, *inter alia*, Whish, *Competition Law*, 6th ed. (OUP, 2009), pp. 126 et seq.

179. Case C-198/01, *Consorzio Industrie Fiammiferi*, [2003] ECR I-8055, paras. 52–56.

180. For this concept, see Case 27/76, *United Brands v. Commission*, [1978] ECR 207, para 65. Arts. 101 and 102 TFEU can be applied simultaneously. See Case 322/81, *Michelin*, [1983] ECR 3461, para 30.

181. *MOTOE*, cited *supra* note 149, para 38.

182. *Ibid.*, para 50; also *Höfner and Elser*, cited *supra* note 156, para 29.

which a Member State has granted special rights within the meaning of Article 106(1). However, this would presuppose that a professional association that has previously been considered as an association of undertakings is also an undertaking itself for the purposes of Article 102. As noted earlier, economic activity is a precondition for the applicability of Article 102. A professional association, however, does not carry out an economic activity coming within this provision.¹⁸³

Alternatively, Article 102 can apply if it can be proven that there is a collective dominant position where several undertakings which are legally independent of each other present themselves to act together on a particular market as a collective entity.¹⁸⁴ As all professionals can be regarded as undertakings within the meaning of EU competition rules, Article 102 could arguably apply in the case of a highly concentrated and homogeneous profession such as accountancy if it can be ascertained that economic links exist between the undertakings or professional service suppliers which enable them to act together independently of their competitors, their customers and consumers.¹⁸⁵ In *Wouters*, the Court rejected the applicability of Article 102 in the case of the legal profession, arguing that lawyers “are not sufficiently linked to each other to adopt the same conduct on the market with the result that competition between them is eliminated”, and that the legal profession “is highly heterogeneous and is characterized by a high degree of internal competition” without sufficient structural links between lawyers.¹⁸⁶ Again, even if a collective dominant position is upheld, it needs to be demonstrated that abuse of such a position has occurred, as clarified in *Piau*.¹⁸⁷

6. Conclusion

Our analysis above demonstrated that the ECJ, while well known as the most prominent trust-building institution of the EU, has adopted a lenient and fairly deferential approach when examining arguments of ethics, professional secrecy, integrity and reputation of the profession and other qualitative elements that CoC should aim to preserve and enhance. This approach is coupled with a country- and sector-specific proportionality test which is focused on the precise

183. *Wouters*, cited *supra* note 51, para 112.

184. Joined Cases C-395/96 & 396/96, *Compagnie Maritime Belge Transports SA*, [2000] ECR I-1365, para 36.

185. *Ibid.*, para 42; and Case T-193/02, *Piau*, [2005] ECR II-209, para 111.

186. *Wouters*, cited *supra* note 51, paras. 113–114.

187. *Piau*, cited *supra* note 185, para 117.

traits of the market and the nature of the profession and its inherent characteristics. More flexible solutions adopted in other countries will not automatically render disproportionate the solutions adopted in the Member States in question. However, the ECJ, as demonstrated in *Laval*, is ready to condemn palpable cases of unjustified distrust.

Building trust is a macro-process deeply rooted in the history of European integration and a continuous challenge for such a diverse region in terms of economic strength, regulatory approaches, or constitutional and cultural background. In the end, this process forms an integral part of the *telos* of the European adventure. However, it is utopian to believe that safe means *risk-free*. Nor can trust be equated to *trustworthiness*.

Be this as it may, the medium- to long-term effect of the Services Directive is expected to be utterly positive. The implementation of the Directive should bring new dynamics to the creation of effective CoC and the building of trust among the peoples of the Union. CoC have been used as a vehicle for introducing several requirements and conditions applied to professionals to foreclose the relevant market and increase the rents for the incumbents over the years. Although it was correctly pointed out that CoC create expectations for third parties, the unpalatable truth is that on their own they cannot result in consistently improved professional behaviour.¹⁸⁸

Among several provisions of the Directive that call for reform, Article 15 provides that self-regulating professional bodies have to evaluate several restrictions enshrined in domestic CoC regarding business structures and legal form; fixed pricing; or territorial restrictions. The need for a revision of restrictions on commercial communications is also underscored. According to the Directive, some of these types of measures, including commercial communications, should form an integral part of any attempt to draw up CoC at EU level for them to be meaningful. The task of creating such CoC appears to be daunting, as will be their implementation once they are adopted at EU level. The Directive specifies that Member States will take accompanying measures encouraging professional associations to implement at national level the pan-European CoC.

As another piece of evidence of the bottom-up approach adopted, the role of national professional associations is essential at each and every stage of this process, from the decision on the content of the pan-European CoC to the surveillance of their implementation and the potential application of disciplinary sanctions. While the Directive does not specify whether the CoC drawn up at EU level will be binding, the long-term preferred constellation is obvious

188. Higgs-Kleyn and Kapelianis, op. cit. *supra* note 60, 365.

from the structure of the Directive: initially voluntary, the CoC adopted at EU level will be transposed at the national level (replacing the current national CoC, if needed) and gradually become binding, thereby ensuring a minimum level of homogeneity and acceptable professional conduct across the Union with regard to issues such as ethics, professional secrecy, integrity, impartiality, business structure, or advertising.¹⁸⁹

189. Admittedly, our conclusion is reminiscent of the graduated normativity theory, which contends that a continuum exists between hard and soft law. See Chinkin, "Normative development in the international legal system" in Shelton (Ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP, 2000), p. 32.

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